

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-022

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JAMES M. WALTERS and DIANE M. WALTERS )

Plaintiffs and Respondents, )

LARRY LULOFF and JANET PERKINS LULOFF, )

Defendants and Appellants. )

ON APPEAL FROM THE MONTANA TWENTY-SECOND JUDICIAL  
DISTRICT COURT, CARBON COUNTY DV 03-57

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**BRIEF OF RESPONDENTS**

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Appellants - Pro Se:

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Attorneys for Respondents:

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## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. The district court properly awarded attorneys fees to Walters.

## **STATEMENT OF CASE**

Plaintiffs are James M. Walters and Diane M. Walters (“Walters” herein) and Defendants are Larry Luloff and Janet Perkins Luloff (“Luloffs” herein). This case has been reviewed by this court in *Walters v. Luloff*, 2008 MT 17, where the judgment against the Luloffs in favor of the Walters was affirmed, and the award of attorneys fees were remanded to the District Court. The District Court on remand confirmed the award of attorneys fees to the Walters, Docket # 200. The issue of determination of the amount of attorneys fees was set for hearing, which was ultimately held on December 2, 2009, Docket #214. The record was left open for further submissions from the Luloffs and on December 18, 2009 the District Court issued its Amended Order Fixing Amount of Attorneys Fees, Docket # 223. This appeal arises therefrom. Luloffs filed a notice of appeal to the Montana Supreme Court on January 13, 2010 Docket # 226.

Luloffs did not seek a stay pending their appeal of the December 19, 2009 judgment. On February 1, 2010, Walters had two Writs of Execution, Docket # 228 and 229, issued upon both of the judgments owed to Walters. Luloffs subsequently offered to satisfy the judgments for less than the amount due on the

judgments. Walters agreed to accept Luloffs offer for less than the amount due and filed a motion to dismiss the appeal, with supporting exhibits, dated June 4, 2010. If that motion is granted this matter is resolved.

## **STATEMENT OF FACTS**

The background of this case has been presented to this Court in *Walters v. Luloff*, 2008 MT 17. The underlying judgment was affirmed and this Court remanded “to the District Court for the sole purpose of determining whether an award of attorneys fees to the Walters remains appropriate on the basis that ‘justice so requires’”. *Walters*, ¶34. The District Court on remand confirmed the award of attorneys fees to the Walters, Docket # 200. The determination of the amount of attorneys fees was set for hearing, which was ultimately held on December 2, 2009. Walters presented testimony as to the appropriate amount of attorneys fees through two affidavits. One affidavit of their counsel, Docket # 215, and one of attorney Anthony W. Kendall, Docket # 212. Luloffs did not present any evidence at the hearing regarding reasonableness of the amount of attorneys fees requested. The record was left open for further submissions from the Luloffs. Luloffs filed a response to the affidavit of Mr. Kendall, Docket # 218. Luloffs responses do not argue that the amount of attorneys fees are unreasonable, but only that they (Luloffs) do not agree with the Supreme Court’s affirming the

initial award of damages to the Walters (Trans. p. 6, l. 16-19) or the District Court's award of attorneys fees. On December 18, 2009 the District Court issued its Amended Order Fixing Amount of Attorneys Fees, Docket # 223.

Luloffs filed a notice of appeal to the Montana Supreme Court on January 13, 2010 Docket # 226. Luloffs hired Kendra Anderson, Esq. to negotiate a settlement with Walters to stop the Walters from executing on Luloffs assets. Walters agreed to settle for less than the full amount due and owing, and thus Luloffs have waived their objection on this appeal to the award of attorneys fees to Walters.

### **SUMMARY OF ARGUMENT**

The underlying judgment in *Walters v. Luloff*, 2008 MT 17 was affirmed and this Court remanded "to the District Court for the sole purpose of determining whether an award of attorneys fees to the Walters remains appropriate on the basis that 'justice so requires'". *Walters*, ¶34. The District Court on remand confirmed the award of attorneys fees to the Walters, Docket # 200. The Luloffs refuse to accept this ruling and request this court "reverse the district court's grant of summary judgment and attorney fees and remand this matter for a new trial." Luloff Brief, p. 15. Luloffs request is barred by the law of the case. *Estate of Snyder*, 352 Mont. 264, 217 P.3d 1027 (2009). Luloffs request is also barred by

res judicata. The doctrine of res judicata bars the relitigation of a claim once a final judgment has been entered. *Holtman v. 4-G's Plumbing and Heating, Inc.* (1994), 264 Mont. 432, 872 P.2d 318.

Walters presented testimony as to the appropriate amount of attorneys fees through two affidavits. One affidavit of their counsel, Docket # 215, and one of attorney Anthony W. Kendall, Docket # 212. Luloffs did not present any evidence at the hearing regarding reasonableness of the amount of attorneys fees requested. The record was left open during the hearing to allow Luloffs to present their arguments in writing. Luloffs responses do not argue that the amount of attorneys fees are unreasonable, but only that they (Luloffs) do not agree with the Supreme Court's affirming the initial award of damages to the Walters (Trans. p. 6, l. 16-19) or the District Court's award of attorneys fees.

A review of the record and the Luloffs opening brief illustrate that their pleadings have been and continue to be largely unintelligible. This behavior has multiplied the proceedings unreasonably and vexatiously to the detriment of the Walters, and the award of attorneys fees is justified. See, M.C.A. § 37-61-421 and *In re Support of K. F.*, 232 Mont. 326, 331, 756 P.2d 460, 463 (1998).

The amount of attorney fees determined by the contingency agreement are less than a determination on an hourly basis. Kendall Affidavit Docket #212 ¶ 10.



The district court properly awarded attorneys fees to Walters and the award should be affirmed.

## **ARGUMENT**

### ***1. STANDARD OF REVIEW***

The standard of review for a district court's grant or denial of a motion for attorney fees is a discretionary ruling which is reviewed to determine whether the district court abused its discretion. *Braach v. Graybeal*, 1999 MT 234, ¶ 6, 296 Mont. 138, ¶ 6, 988 P.2d 761, ¶ 6.

A district court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason resulting in substantial injustice. *Pumphrey v. Empire Lath and Plaster*, 2006 MT 255, ¶ 9, 334 Mont. 102, ¶ 9, 144 P.3d 813, ¶ 9. *See also H-D Irrigating v. Kimble Properties*, 2000 MT 212, ¶ 61, 301 Mont. 34, ¶ 61, 8 P.3d 95, ¶ 61.

Luloffs presented documents in their appendix to their opening brief which are improperly included in this appeal. Luloffs may not relitigate issues that have already been determined by this court. All Exhibits listed except 27, 28, 29, 31, 32 should be stricken and disregarded. While some of these documents are properly part of the record, presentation at this point is improper and unnecessary. These documents should be disregarded by this Court as they are presented in an effort to

relitigate issues already determined by this Court.

This court has previously explained that, while *pro se* litigants may be given a certain amount of latitude, that latitude cannot be so wide as to prejudice the other party, and it is reasonable to expect *pro se* litigants to adhere to procedural rules. *Greenup v. Russell*, 2000 MT 154, 300 Mont. 136, 3 P.3d 124. Further, this Court has stated that it is well settled that issues not presented to the district court will not be addressed on appeal. *Wyman v. DuBray Land Realty*, 231 Mont. 294, 299, 752 P.2d 196 (1998).

Luloffs have failed to properly raise an objection to the amount of the attorneys fees and instead repeat their losing arguments to the underlying judgment. This court in *Estate of McDermott*, 310 Mont. 435, 51 P.3d 486 (2002) has held that it is well settled that we will not address an issue on appeal that a party did not properly raise in the district court. *Nason v. Leistiko*, 1998 MT 217, ¶ 11, 290 Mont. 460, ¶ 11, 963 P.2d 1279, ¶ 11 (citing *Marsh v. Overland*, 274 Mont. 21, 29, 905 P.2d 1088, 1093 (1995)).

## **2. THE DISTRICT COURT PROPERLY AWARDED ATTORNEYS FEES TO WALTERS.**

Luloffs have failed to properly raise an objection to the amount of the attorneys fees awarded to Walters and instead repeat their losing arguments to the

underlying judgment. This court in *Estate of McDermott*, 310 Mont. 435, 51 P.3d 486 (2002) has held that it is well settled that we will not address an issue on appeal that a party did not properly raise in the district court. *Nason v. Leistiko*, 1998 MT 217, ¶ 11, 290 Mont. 460, ¶ 11, 963 P.2d 1279, ¶ 11 (citing *Marsh v. Overland*, 274 Mont. 21, 29, 905 P.2d 1088, 1093 (1995)).

Luloffs brief does not conform to the appellate rules and the relief requested is not available. The relief requested by the Luloffs in their opening brief on page 15 is:

**The Luloffs respectfully request that the court reverse the district court's grant of summary judgment and attorney fees and remand this matter for a new trial. Further, Luloffs request this matter be remanded because the district as the trier of fact failed to apportion fault as required by Mont. Code Ann. 27-1-705. Emphasis added.**

Again, this Court has affirmed the underlying judgment in this matter *Walters v. Luloff*, 2008 MT 17 on January 28, 2008. The grant of summary judgment was affirmed and the argument alleging the failure to apportion fault was unpersuasive and unsuccessful. The remaining issue of attorneys fees was remanded and subsequently awarded again to the Walters by the District Court. Luloffs at the hearing on the amount of attorneys fees attempted to argue the

underlying judgment again, and now again specifically repeat the same arguments of their previous counsel who represented them during their initial appeal. Luloffs request is barred by the law of the case. *Estate of Snyder*, 352 Mont. 264, 217 P.3d 1027 (2009).

This Court in *Snyder* at ¶ 6 has held that the law-of-the-case doctrine is based on policies of judicial economy and finality of judgments. Under this doctrine, a prior decision of this court resolving an issue between the same parties is binding and may not be relitigated. *Muri v. Frank*, 2003 MT 316, ¶ 11, 318 Mont. 269, 80 P.3d 77. Luloffs are bound by the affirmation of the summary judgment. Walters are entitled to finality of this litigation which began for them in 2003.

Additionally, Luloffs claims were already addressed by this court and are now barred by res judicata. The doctrine of res judicata bars the relitigation of a claim once a final judgment has been entered. *Holtman v. 4-G's Plumbing and Heating, Inc.* (1994), 264 Mont. 432, 872 P.2d 318. Finality is accorded to the disposition of all issues that were raised or that could have been raised; a party, therefore, is prohibited from relitigating a claim that he or she has already had an opportunity to litigate. *Traders State Bank v. Mann* (1993), 258 Mont. 226, 238, 852 P.2d 604, 611. T *Federated Mut. Ins. Co. v. Anderson*, 1999 MT 288, ¶ 58,

297 Mont. 33, ¶ 58, 991 P.2d 915, ¶ 58.

A review of the record and the Luloffs opening brief clearly illustrate that their pleadings have been and continue to be largely unintelligible. This behavior has multiplied the proceedings unreasonably and vexatiously to the detriment of the Walters, and the award of attorneys fees is justified. See, M.C.A. § 37-61-421 and *In re Support of K. F.*, 232 Mont. 326, 331, 756 P.2d 460, 463 (1998). The District Court properly awarded Walters attorneys fees in this matter. The amount of the attorneys fees is reasonable and supported by the record. Given the length of time this matter has taken, the reasonable amount of attorneys fees is determined pursuant to the contingency fee agreement between the Walters and their counsel. The amount of attorney fees determined by the contingency agreement are less than a determination on an hourly basis. Kendall Affidavit Docket #212 ¶ 10.

The attorneys fees award and amount are properly granted.

### **CONCLUSION**

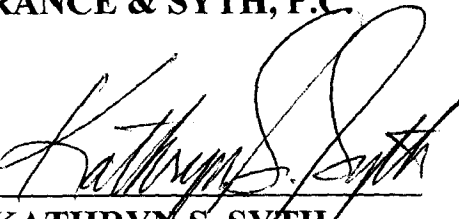
Luloffs failed to request a stay of judgment pending appeal and waived their objection to the award of attorneys fees to Walters upon payment of judgment. Further, Luloffs actions during much of this litigation were unreasonable, unjustified, and have been taken to delay the process. The District Court has the

equitable power to award attorney fees. Luloffs did not object to the amount of attorneys fees awarded. The District Court properly awarded Walters their attorneys fees in the interests of justice.

The District Court's award of attorney fees to Walters should be affirmed.

RESPECTFULLY SUBMITTED the 7<sup>th</sup> day of June, 2010.

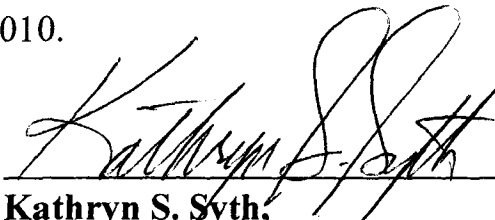
**LaRANCE & SYTH, P.C.**

By:   
**KATHRYN S. SYTH,**  
**Attorney for Respondents**

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately space New Roman Times typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 9, is not more than 14,000 words, not averaging more than 280 words per page, excluding CERTIFICATE OF COMPLIANCE and CERTIFICATE OF SERVICE.

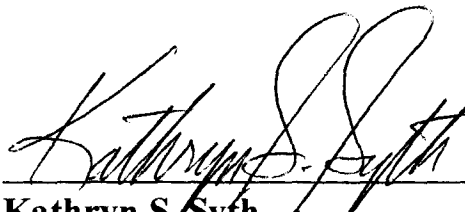
Dated this 7<sup>th</sup> day of June, 2010.

  
**Kathryn S. Syth,**  
**Attorney for Respondents**

## **CERTIFICATE OF SERVICE**

This is to certify that on the 7<sup>th</sup> day of June, 2010, the foregoing Brief of Respondents was duly served by first class U.S. mail, postage prepaid upon the following persons:

Larry and Janet Luloff  
208 Stormitt Butte Road  
Roberts, MT 59070

  
**Kathryn S. Syth,**  
**Attorney for Respondents**